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Sent: Tuesday, July 29, 2008 12:24 PM
To: Web OLA Email
Subject: Comments to NMB on Proposed Changes to NMB Representation Manual
VIA FACSIMILE AND EMAIL

Ms. Mary L. Johnson
General Counsel
National Mediation Board
Suite 250 East
1301 K Street
Washington, D.C. 20005

Re: Comments on Proposed Changes to the Board's Representation Manual

Dear Ms. Johnson:

This will respond to the Board's invitation to provide comments regarding the revisions and clarifications to portions of its Representation Manual that are now under consideration. Thank you for providing us the opportunity to submit our views concerning these matters.

Most of the changes that have been proposed to the Manual simply explain existing Board practice. The new language that has been added to Section 2.4 of the Manual, however, seems to create an ambiguity in how the election process is to work, and we suggest that the rule be refined to clarify its meaning or else that the revision be eliminated altogether.

Section 2.4 of the current Manual imposes an obligation on a carrier to provide a list of eligible voters and signature samples. As with all of the responsibilities imposed on carriers during the representation election process, it is generally understood that a carrier's failure to meet the Board's requirements could result in an election being overturned. For instance, if a carrier fails to post the Notice of Election as required by Section 13.1, to furnish the address list in accordance with Section 12.1, or to provide supporting documentation of changes in employee status under Section 12.3, the Board has the authority to determine whether the laboratory conditions for the election have been tainted by that conduct and to decide on an appropriate remedy. No specific instruction that the failure of a carrier to comply with those directives could result in election interference is necessary in those sections of the Manual, and, yet, all parties understand the potential consequences for disobedience.

The language to be added to Section 2.4, "[t]he carrier's failure to provide a substantially accurate list of potential eligible voters may be considered interference with the NMB's election process and therefore grounds for setting aside the election," is therefore unnecessary. No one expects the Board to compile a complete list of the conduct by carriers or labor organizations that could amount to election interference; rather, until now, the circumstances involved in each case have been considered in determining whether an election is to be overturned. Explicit warnings of the sort proposed in Section 2.4 have never before been needed and appear nowhere else in the Representation Manual. The insertion of that admonition in the middle of Section 2.4 is particularly curious because it addresses only inaccurate eligibility lists---irrespective of whether any errors included in the list were purely inadvertent and of the carrier's good faith in compiling the list---and not the signature samples that a carrier is also obligated to furnish as part of that same section.

More importantly, inclusion of that language creates uncertainty concerning the obligations of the parties during the election process. Under the practice that has been followed for decades, it has been the responsibility of the labor organizations involved to file timely challenges and objections during the Board's investigation, well before the election is to be conducted, if errors exist in the list of eligible voters. Section 8.1 of the Manual expressly provides that, "[a]bsent extraordinary circumstances,

challenges and objections not filed by the deadline [as established by the Investigator during the investigatory stage of the proceeding] will not be considered.”

With the proposed modification to Section 2.4, though, a labor organization is invited to wait until after the tally of ballots to raise issues concerning the list of eligible voters. Only after the election does the Board investigate allegations of election interference, and, pursuant to Section 17.0, such allegations of interference need not be filed until seven business days after the tally. A union that has discovered mistakes in the voter list may decide to dispense with following the challenges and objections procedures set forth in Sections 8 and 10 of the Manual and, instead, after the results of the election have been announced, file interference allegations. Accordingly, we respectfully suggest that the additional language that has been proposed for Section 2.4 of the Manual be deleted entirely or, alternatively, that it be modified to make clear that unions must abide by the provisions of Sections 8 and 10 in order for them to be able to pursue allegations of election interference on the grounds that the list of eligible voters was inaccurate.

Again, we appreciate your consideration of these comments. Please let me know if you would like any additional information concerning this matter.

Respectfully submitted,

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